

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the matter of	)	
	)	
Valor Telecommunications, LLC	)	WCB/Pricing 02-26
Petition for Waiver of Section 61.41	)	
Of the Commission's Rules	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 19, 2002****Released: December 20, 2002**

By the Senior Deputy Chief, Wireline Competition Bureau:

**I. INTRODUCTION**

1. In this order, we grant the petition of Valor Telecommunications, LLC (Valor) for waiver of the Commission's "all-or-nothing" rule.<sup>1</sup> By granting this petition, we allow the existing exchanges of Valor's wholly-owned subsidiary Kerrville Telephone Company (Kerrville) to continue to operate under rate-of-return regulation, until the Commission completes its review of the "all-or-nothing" rule.<sup>2</sup>

**II. BACKGROUND**

2. *The "All-or-Nothing" Rule.* Section 61.41 of the Commission's rules is designed to ensure that all of a carrier's study areas and affiliates are subject to a single form of pricing regulation—either price cap regulation or rate-of-return regulation.<sup>3</sup> This rule is commonly referred to as the "all-or-nothing" rule. Specifically, section 61.41 provides that, if an individual rate-of-return carrier or study area converts to price cap regulation, all of its affiliates or study areas must also do so, except for those using average schedules.<sup>4</sup> This section also provides that, if a price cap carrier enters into a merger, acquisition, or similar transaction, it must continue to operate under price cap regulation after the transaction.<sup>5</sup> In addition, when rate-of-return and

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<sup>1</sup> See 47 C.F.R. § 61.41; Valor Telecommunications, LLC Petition for Waiver of Section 61.41 of the Commission's Rules (filed Sept. 10, 2002) ("Valor Petition").

<sup>2</sup> *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613 (2001) (*Rate-of-Return Access Charge Reform Further Notice*) (seeking comment on the all-or-nothing rule).

<sup>3</sup> 47 C.F.R. § 61.41.

<sup>4</sup> 47 C.F.R. § 61.41(b).

<sup>5</sup> 47 C.F.R. § 61.41(c)(1).

price cap carriers merge or acquire one another, the rate-of-return carrier must convert to price cap regulation within one year.<sup>6</sup> These requirements address two concerns the Commission has regarding mergers and acquisitions involving price cap and non-price cap companies. First, a carrier might attempt to shift costs from its price cap affiliates to its non-price cap affiliates.<sup>7</sup> This would allow the non-price cap affiliate to charge higher rates than would otherwise be permitted to recover its higher revenue requirement, while simultaneously increasing the profits of the price cap affiliate as a result of these cost savings.<sup>8</sup> Second, a carrier might attempt to “game the system” by switching back and forth between rate-of-return regulation and price cap regulation.<sup>9</sup> A rate-of-return carrier could build a large rate base in order to raise rates, and then return to price cap regulation and reduce costs to an efficient level, thereby maximizing its profits at the expense of ratepayers.<sup>10</sup>

3. *Commission Review of the “All-or-Nothing” Rule.* The continued utility of the “all-or-nothing” rule is currently under consideration in the *Rate-of-Return Access Charge Reform Further Notice*.<sup>11</sup> In the *Notice*, the Commission noted that the “all-or-nothing” rule was created ten years ago, and stated that it wished to explore whether its regulatory policy of generally not permitting affiliated carriers to operate under different systems of regulation continues to serve any public interest.<sup>12</sup> It requested comment on whether the rule should be retained, repealed, or modified.<sup>13</sup> The Commission requested comment on whether the “all-or-nothing” restrictions unfairly limit affiliated companies from selecting regulatory options that would enable them to operate more efficiently, especially in light of the highly diverse service areas of some carriers.<sup>14</sup>

### III. DISCUSSION

4. Generally, the Commission's rules may be waived for good cause shown.<sup>15</sup> As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.<sup>16</sup>

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<sup>6</sup> 47 C.F.R. § 61.41(c)(2).

<sup>7</sup> *Rate-of-Return Access Charge Reform Further Notice*, 16 FCC Rcd at 19781, para. 261.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 19720-24, paras. 266-271.

<sup>12</sup> *Id.* at 19720, para. 266.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 19720, para. 267. The Commission also requested comment on whether and how circumstances have changed since the rule was adopted; whether competition would be better served with or without the rule; whether the rule is working effectively, especially in light of the rule waivers the Commission grants; what impact an increasingly competitive environment has on the rules; whether the rule is still necessary to prevent cost-shifting and gaming; and how rate-of-return carriers that are required to convert to price cap regulation will receive universal support. *Id.* at 19720-24, paras. 267-71.

<sup>15</sup> 47 C.F.R. § 1.3.

<sup>16</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>17</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>18</sup> Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.<sup>19</sup>

5. Valor requests that the Commission waive sections 61.41(b) and 61.41(c)(2) of its rules,<sup>20</sup> to allow Valor's wholly-owned subsidiary, Kerrville, to continue to be regulated as a rate-of-return incumbent local exchange carrier. Valor has approximately 565,000 access lines and primarily serves rural communities in New Mexico, Oklahoma, Texas, and Arkansas.<sup>21</sup> It is subject to price cap regulation.<sup>22</sup> Kerrville, a rate-of-return carrier, provides incumbent local exchange services to residential and business customers in Texas, serving approximately 27,000 access lines in two exchanges.<sup>23</sup> On December 18, 2001, the Commission approved an application to transfer control of Kerrville to Valor, and the transfer closed on January 31, 2002.<sup>24</sup> Under section 61.41(c)(2) of the Commission's rules, any carrier that is acquired by a price cap carrier becomes subject to price cap regulation no later than one year after the effective date of the acquisition and must file price cap tariffs to be effective by the same date.<sup>25</sup> Valor requests a grant of its petition in advance of January 31, 2003, when Kerrville otherwise would become subject to price cap regulation.<sup>26</sup>

6. Valor maintains that its petition for waiver of sections 61.41(b) and 61.41(c)(2) would serve the public interest and is consistent with prior Commission decisions granting similar waiver requests.<sup>27</sup> It argues that there is no reasonable basis for concern that Valor would be able successfully to engage in the kind of cost shifting that the "all-or-nothing" rule was

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<sup>17</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>18</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular Telephone*, 897 F.2d at 1166.

<sup>19</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular Telephone*, 897 F.2d at 1166.

<sup>20</sup> 47 C.F.R. §§ 61.41(b), 61.41(c)(2). The "all-or-nothing" rule mandates that, when a price cap carrier acquires, is acquired by, merges with, or otherwise becomes affiliated with, a non-price cap carrier, the non-price cap carrier shall become subject to price cap regulation.

<sup>21</sup> Valor Petition at 2.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.* (citing Common Carrier Bureau and Wireless Telecommunications Bureau Grant Consent for Transfer of Control of Licenses and Authorizations of Kerrville Communications Corporation, Inc. to Valor Telecommunications Enterprises II, LLC, Public Notice, 16 FCC Rcd 22434 (2001)).

<sup>25</sup> 47 C.F.R. § 61.42(c)(2).

<sup>26</sup> Valor Petition at 3.

<sup>27</sup> *Id.* at 3-5.

created to prevent.<sup>28</sup> Valor also argues that waiver is appropriate pending the Commission's review of the "all-or-nothing" rule in its *Rate-of-Return Access Charge Reform Further Notice*.<sup>29</sup>

7. The Bureau sought comment on Valor's petition on September 18, 2002.<sup>30</sup> The National Exchange Carrier Association (NECA) and the United States Telecom Association (USTA) subsequently filed comments in support of Valor's petition.<sup>31</sup> NECA argues that waiver would maintain efficiency and stability by allowing Kerrville to continue to participate in the NECA common line pool.<sup>32</sup> USTA argues that Valor should receive the same treatment as other carriers that have been granted waiver pending the outcome of the *Rate-of-Return Access Charge Reform Further Notice*.<sup>33</sup> USTA also asserts that wireless competition, in addition to existing federal and state regulatory safeguards, are effective constraints against the kind of cost shifting that the "all-or-nothing" rule was created to prevent.<sup>34</sup> No commenters opposed Valor's petition.

8. We find that good cause exists to grant Valor's waiver request. As we have previously noted, rate-of-return carriers confront numerous serious and complex issues regarding universal service support whenever the "all-or-nothing" rule requires them to convert to price cap regulation.<sup>35</sup> We also note that Valor claims it will suffer substantial financial and administrative burdens if required to convert its Kerrville exchanges to price cap regulation.<sup>36</sup> We agree that the outcome of the pending *Rate-of-Return Access Charge Reform Further Notice* will directly affect the issues raised by Valor's waiver request. In the *Notice*, the Commission is considering whether to modify or eliminate the "all-or-nothing" rule. We anticipate that these issues likely will be resolved before June 2003, when Valor/Kerrville must make its annual access filing.<sup>37</sup> Under these special circumstances, we find that the public interest will be served by allowing Kerrville to remain under rate-of-return regulation until the Commission completes its review of the "all-or-nothing" rule.

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<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> Valor Telecommunications Files Petition for Waiver of the Commission's "All-or-Nothing" Rule (Sections 61.41(b) and 61.41(c)(2)), Pleading Cycle Established, WCB/Pricing 02-26, Public Notice, DA 02-2302 (rel. Sept. 18, 2002).

<sup>31</sup> Comments of the National Exchange Carrier Association, Inc., WCB/Pricing 02-26 (filed Oct. 10, 2002) (NECA Comments); Comments of the United States Telecom Association, WCB/Pricing 02-26 (filed Oct. 10, 2002) (USTA Comments).

<sup>32</sup> NECA Comments at 2.

<sup>33</sup> USTA Comments at 2-3.

<sup>34</sup> *Id.* at 3.

<sup>35</sup> See, e.g., *ALLTEL Corporation et al. Petitions for Waiver of Section 61.41 of the Commission's Rules*, CCB/CPD No. 01-28, Memorandum Opinion and Order, DA 02-888 at para. 20 (rel. Apr. 18, 2002) (citing *Puerto Rico Telephone Company Petition for Waiver of Section 61.41 or Section 54.303(a) of the Commission's Rules*, CCB/CPD No. 99-36, Order, 15 FCC Rcd 9680, 9682-83 para. 5 (2000)).

<sup>36</sup> See Valor Petition at 5, 7; see also NECA Comments at 2; USTA Comments at 3.

<sup>37</sup> See 47 C.F.R. §§ 61.39, 69.3(f)(2).

**IV. ORDERING CLAUSES**

9. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of the Commission's rules, 47 C.F.R. § 61.41, filed by Valor Telecommunications, LLC IS GRANTED, to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Jeffrey Carlisle  
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Wireline Competition Bureau